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2 THE HONORABLE MARSHA J. PECHMAN
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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 CLUB 21 LLC dba SUGARS
10 NIGHTCLUB, TALENTS WEST II LLC,
11 RYAN McLEOD, and CATRINA NYHUS,

12 Plaintiffs,

13 v.

14 CITY OF SHORELINE, TONY BURTT,
15 SHORELINE CHIEF OF POLICE, and
16 SCOTT PASSEY, SHORELINE CITY
17 CLERK,

18 Defendants.

Case No. C08-0078 MJP

ORDER GRANTING DEFENDANT
CITY OF SHORELINE'S MOTION
FOR PARTIAL SUMMARY
JUDGMENT AND DENYING
PLAINTIFF CLUB 21'S MOTION
FOR SUMMARY JUDGMENT

19 This matter comes before the Court on Defendant City of Shoreline's motion for
20 partial summary judgment and Plaintiff Club 21's motion for partial summary judgment on
21 the issue of vicarious standing. (Dkt. Nos. 36, 53.) Defendant's motion asks the Court to
22 dismiss Plaintiffs Ryan McLeod and Catrina Nyhaus for lack of standing. Plaintiffs'
23 motion asks the Court to rule that Club 21 has standing to assert a constitutional challenge
24 to Shoreline's municipal code. The Court has considered the motions, the responses (Dkt.
Nos. 37, 68), the replies (Dkt. Nos. 42, 73.), and all other pertinent documents in the record.
For the reasons set forth below, the Court GRANTS Defendant's motion and DENIES
Plaintiff's motion.

Background

Plaintiffs are various entities and individuals challenging various aspects of the City of Shoreline's Adult Cabaret Ordinance. (First Amended Compl. ¶ 3.1) Plaintiff Club 21 LLC ("Club 21") is a limited liability cooperation operating Sugars Nightclub in Shoreline. (Id. at ¶1.1.) Plaintiff Ryan McLeod is a part-time manager at Sugars. (McLeod Decl. ¶ 1.) Mr. McLeod once had a Shoreline Manager's license, as required by the city's Municipal Code, but has since allowed the license to lapse. (Id. ¶ 2 (further signaling his intent to apply for a renewal of his license).) Plaintiff Catrina Nyhaus, a licensed entertainer, performs at Sugars and was arrested there in August 2008. (Nyhus Decl. ¶¶ 1-2.)

Sugars is a nightclub featuring "nude dancing and erotic entertainment" in Shoreline. (Compl. ¶ 3.1.) Shoreline licenses and regulates Sugars through Chapter 5.10 of the Shoreline Municipal Code (also known as the Adult Cabaret Ordinance). (Id.) Entertainers like Ms. Nyhaus are independent contractors paid directly by customers to perform stage and individual performances. (Id. ¶ 3.2.) Shoreline's Municipal Code provides that off-stage performances take place with a "distance of no less than four feet, measured from the forehead of the entertainer to the forehead of the customer paying for the dance." SMC 5.10.070(A)(6) ('the four foot rule"). Under SMC 5.10.070(B)(8), managers are responsible for making sure that all entertainers comply with the four foot rule. Violation of the Adult Cabaret Ordinance is a misdemeanor. SMC 5.10.110. On December 27, 2007 and January 11, 2008, the King County Sheriff's Office arrested several managers and entertainers at Sugars. (Compl. ¶¶ 3.9-3.10.)

Plaintiffs' complaint asserts several claims: (1) bad faith law enforcement and harassment and deprivation of Plaintiffs' First, Fourth, and Fourteenth Amendment rights; (2) a First Amendment overbreadth challenge to the Adult Cabaret Ordinance and a § 1983

1 claim based on their enforcement; and (3) a Washington Constitution claim. (See Amended
2 Compl.) Plaintiffs had included a challenge to Shoreline’s licensing provisions for
3 managers and entertainers, but dismissed the claim because Shoreline has amended its
4 licensing provisions. (Dkt. Nos. 51, 76.)

5 Defendant City of Shoreline moves for summary judgment on three issues: (1)
6 whether either party has standing to challenge Shoreline’s licensing provisions for
7 managers and entertainers; (2) whether Mr. McLeod has standing to challenge the strict
8 liability provisions for managers (5.10.070(B)(8)); and (3) whether Ms. Nyhaus may
9 challenge Shoreline’s “four foot rule” (codified at 5.10.070). (Dkt. No. 36.) In light of
10 Plaintiffs’ voluntary dismissal of certain claims (Dkt. No. 76), Defendant’s arguments
11 concerning the licensing provisions are moot. Club 21’s motion for partial summary
12 judgment asks the Court to rule that Club 21 has standing to challenge the Adult Cabaret
13 Ordinance. (Dkt. No. 53 at 2.)

14 Discussion

15 I. Standing

16 The “irreducible constitutional minimum of standing” requires a plaintiff to
17 demonstrate (1) they have suffered an injury in fact that is (2) causally connected to the
18 defendant’s purportedly offensive conduct and (3) that a favorable decision will likely
19 redress their injury. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (further
20 noting that the injury must be “concrete and particularized” and “actual or imminent”)
21 (citations omitted). As “the party invoking federal jurisdiction,” Plaintiffs bear the burden
22 of establishing standing. Id. Because the elements of standing are an essential part of a
23 plaintiff’s case, “each element must be supported in the same way as any other matter on
24 which the plaintiff bears the burden of proof.” Id. (“In response to a summary judgment

1 motion . . . the plaintiff can no longer rest on . . . ‘mere allegations,’ but must ‘set forth’ by
2 affidavit or other evidence ‘specific facts.’” (citing Fed. R. Civ. P. 56(e)).

3 II. Summary Judgment

4 Summary judgment is not warranted if a material issue of fact exists for trial.
5 Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 516 U.S. 1171
6 (1996). The underlying facts are viewed in the light most favorable to the party opposing
7 the motion. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).
8 “Summary judgment will not lie if . . . the evidence is such that a reasonable jury could
9 return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242,
10 248 (1986). The party moving for summary judgment has the burden to show initially the
11 absence of a genuine issue concerning any material fact. Adickes v. S.H. Kress & Co., 398
12 U.S. 144, 159 (1970). However, once the moving party has met its initial burden, the
13 burden shifts to the nonmoving party to establish the existence of an issue of fact regarding
14 an element essential to that party’s case, and on which that party will bear the burden of
15 proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). To discharge this
16 burden, the nonmoving party cannot rely on its pleadings, but instead must have evidence
17 showing that there is a genuine issue for trial. Id. at 324.

18 III. Plaintiff McLeod

19 Shoreline argues Plaintiff McLeod lacks standing to challenge the manager’s
20 liability provisions of the Adult Cabaret Ordinance. In a case that raises concerns over a
21 statute, a plaintiff must allege an injury arising “as the result of the challenged statute.”
22 O’Shea v. Littleton, 414 U.S. 488, 494 (1974). In City of Los Angeles v. Lyons, the
23 Supreme Court held a plaintiff lacked standing to pursue equitable relief in his challenge to
24 a police practice of choke-holding suspects because he could not establish “a real and

1 immediate threat that he would again be stopped for a traffic violation, or for any other
2 offense, by an officer or officers who would illegally choke him into unconsciousness
3 without any provocation.” 461 U.S. 95, 105 (1983). Evidence of “past wrongs” is relevant
4 to the Court’s determination of whether an immediate threat exists. Id. at 102.

5 Mr. McLeod works at Sugars on a “part time basis” when other managers are sick or
6 on vacation. (McLeod Decl. ¶ 1.) He has allowed his Manager’s license to lapse, but states
7 he intends to renew it. (Id. ¶ 2.) It does not appear as if he has been arrested because Mr.
8 McLeod only states he “worked at Sugars . . . when the night manager was placed under
9 arrest.” (Id. ¶ 1.)¹ Nevertheless he “fears prosecution and arrest” under the manager’s
10 liability portions of the Ordinance. Like the plaintiff in Lyons, Mr. McLeod cannot
11 demonstrate a “real and immediate threat” of injury. For Mr. McLeod to be injured, he
12 would have to reapply for a license, receive a license, then fill-in for a permanent manager
13 at a time where the Adult Cabaret Ordinance was being violated, fail to act to end the
14 violation, and be arrested. (See Dkt. No. 42 at 4.) Because this Court must assume that
15 Plaintiffs will “conduct their activities within the law and so avoid prosecution,” the Court
16 cannot conclude that Mr. McLeod is at danger of suffering any injury. Lyons, 461 U.S. at
17 103 (quotations omitted).

18 Plaintiff McLeod analogizes to Jones v. City of Los Angeles, where a group of
19 homeless individuals could demonstrate standing to challenge an ordinance that prevented
20 people from sleeping on the sidewalk. 444 F.3d 1118 (9th Cir. 2006) (opinion vacated by
21 Jones v. City of Los Angeles, 505 F.3d 1006 (9th Cir. 2007)). The opinion in Jones has
22 been vacated and is no longer good law. The Court believes it is appropriate to dismiss Mr.
23 McLeod’s challenge to the manager’s liability provision for lack of standing.

24 ¹ Plaintiffs cite no other “past wrongs” Mr. McLeod has suffered from the ordinance. Lyons, 461 U.S. at 102.

1 IV. Plaintiff Nyhaus

2 The parties further disagree about Ms. Nyhaus' standing to challenge the four foot
3 rule. (Dkt. No. 39 at 5; Dkt. No. 42 at 3.) This Court generally evaluates jurisdiction on
4 the basis of the facts "as they exist when the complaint is filed." See Newman-Green, Inc.
5 v. Alfonzo-Larrian, 490 U.S. 826, 830; see also Skaff v. Meridien North America Beverly
6 Hills, LLC, 506 F.3d 832, 838 (9th Cir. 2007) ("standing turns on the facts as they existed
7 at the time the plaintiff filed the complaint").

8 Ms. Nyhaus states she intends to continue performing at Sugars, despite her arrest in
9 August 2008. (Nyhaus Decl. ¶ 1.) Furthermore, she fears arrest and prosecution because of
10 "the arrest procedures that occurred at Sugars in August 2008 and at other times in the
11 past." (Id. ¶ 3.) Plaintiffs filed their amended complaint in this matter on May 5, 2008,
12 several months before Ms. Nyhaus was arrested. Thus, in evaluating the "past wrongs"
13 related to Ms. Nyhaus' alleged threat of injury, the Court cannot consider her August 2008
14 arrest. Without any applicable "past wrongs," Ms. Nyhaus cannot establish she had
15 standing to challenge the four foot rule at the time she filed the amended complaint.
16 Defendant is entitled to summary judgment on the issue.

17 V. Plaintiff Club 21

18 Plaintiff Club 21 filed a separate motion for summary judgment asking the Court to
19 rule that, even if Ms. Nyhaus and Mr. McLeod lack standing, Club 21 has standing to
20 challenge the four foot rule and the manager's liability provisions of the Adult Cabaret
21 Ordinance. (Dkt. No. 53 at 1-2 (citing SMC 5.10.070(A)(6) ("four foot rule") and SMC
22 5.10.070(B)(8) (manager's liability).) A party opposing summary judgment on the issue of
23 standing must only show "that there is a genuine question of material fact as to the standing
24 elements." Central Delta Water Agency v. United States, 306 F.3d 938, 946 (9th Cir. 2002).

1 While third party standing is disfavored as a prudential matter, overbreadth
2 challenges under the First Amendment raise unique concerns that “may at times outweigh
3 the policies behind the general rule against third-party standing.” 15 Moore’s Federal
4 Practice § 101.51[3][e]; see also Sec’y of State of Maryland v. Joseph H. Munson Co., 467
5 U.S. 947, 957 (1984) (“where the claim is that a statute is overly broad in violation of the
6 First Amendment, the Court has allowed a party to assert the rights of another without
7 regard to the ability of the other to assert his own claims . . .”). Even though the
8 overbreadth doctrine relaxes the Court’s prudential standing concerns, a plaintiff must
9 demonstrate the constitutionally-required injury in fact. Dream Palace v. County of
10 Maricopa, 384 F.3d 990, 999 (9th Cir. 2004) (citations omitted). Thus, “the crucial issues
11 in determining overbreadth standing ‘are whether [the plaintiff] satisfies the requirement of
12 ‘injury-in-fact’ and whether it can be expected satisfactorily to frame the issues in the
13 case.’” 4805 Convoy, Inc. v. City of San Diego, 183 F.3d 1108, 1112 (9th Cir. 1999)
14 (quoting Munson, 467 U.S. at 958) (Convoy had standing to challenge license revocation
15 and suspension procedures but did not have standing to challenge a licensing provision that
16 would never apply to it).

17 The evidence presented in support of Plaintiff’s motion does not demonstrate the
18 absence of a material question of fact on the issue of standing.² The two declarations from
19 Club 21’s principal, John Conte, do not reference either the four foot rule or the manager’s
20 liability provision of the Adult Cabaret Ordinance. (See Conte Decl. ¶ 5 (complaining that
21 “fewer entertainers are willing to perform” after the “raids” without describing what
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23 ² In its motion, Plaintiff claims to rely upon a declaration from Mr. Levy and “attachments thereto
24 filed on 10/26/08.” (Dkt. No. 53 at 3.) The docket does not reflect that there were any documents
filed on October 26, 2008 in this matter. In addition to examining all pertinent documents in the
record, the Court has considered both of Mr. Levy’s declarations on the issue of standing. (Dkt.
Nos. 38, 56.)

1 specific violations gave rise to the arrests) and Suppl. Conte Decl. ¶ 5 (same).) The first
2 Levy Declaration presents testimony from certain police officers who participated in arrests
3 at Sugars, a series of incident reports from the arrests, and complaints filed by Shoreline
4 against certain entertainers—none of these documents clarify Club 21’s complaint of a free
5 speech-related injury. (See Levy Decl.) The second Levy Declaration contains a series of
6 interrogatory answers by Mr. McLeod and Ms. Nyhaus as well as additional deposition
7 testimony from another police officer. (See Suppl. Levy Decl.) None of this evidence
8 describes with any specificity the chilling effect caused by the four foot rule. In other
9 words, Plaintiff has not carried its initial burden as the movant demonstrating the absence
10 of a material fact on the issue. See Adickes, 398 U.S. at 159.


11 The Court notes, however, that denying Plaintiff’s motion does not alter the posture
12 of the case. The Court’s denial of Plaintiff’s motion is not a ruling that Club 21 lacks
13 standing. It is merely a ruling that Plaintiff has not borne its burden to merit summary
14 judgment on the issue.

1 **Conclusion**

2 On the evidence presented, Mr. McLeod lacks standing to challenge the manager's
3 liability provision of the Shoreline Municipal Code. Similarly, Ms. Nyhaus lacks standing
4 to challenge the four foot rule of the Adult Cabaret Ordinance. Defendants' motion (Dkt.
5 No. 36) is GRANTED. Club 21's motion (Dkt. No. 53) is DENIED because Plaintiff has
6 not established the absence of material disputes relating to its alleged "injury in fact."

7 The Clerk is directed to transmit a copy of this Order to all counsel of record.

8 Dated this 10th day of April, 2009.

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11 Marsha J. Pechman
12 United States District Judge
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